

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ANDREW KORINEK,

Plaintiff(s),

vs.

CAROLYN W. COLVIN, ACTING  
 COMMISSIONER OF SOCIAL SECURITY,

Defendant(s).

Case No. 2:15-cv-00496-GMN-NJK

REPORT AND RECOMMENDATION

(Docket Nos. 16, 21)

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for a period of disability and disability insurance benefits pursuant to Title II of the Social Security Act. Currently pending before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 16. The Commissioner filed a response in opposition and a Cross-Motion to Affirm. Docket Nos. 21-22. Plaintiff filed a reply. Docket No. 23. The matter came on for hearing on April 20, 2016. Docket No. 29. This action was referred to the undersigned magistrate judge for a report of findings and recommendation.

**I. STANDARDS**

A. Judicial Standard of Review

The Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) provides that, “[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a

1 review of such decision by a civil action . . . brought in the district court of the United States for the  
2 judicial district in which the plaintiff resides.” The Court may enter, “upon the pleadings and transcript  
3 of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
4 Security, with or without remanding the cause for a rehearing.” *Id.*

5 The Commissioner’s findings of fact are deemed conclusive if supported by substantial evidence.  
6 *Id.* To that end, the Court must uphold the Commissioner’s decision denying benefits if the  
7 Commissioner applied the proper legal standard and there is substantial evidence in the record as a  
8 whole to support the decision. *See, e.g., Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). The  
9 Ninth Circuit defines substantial evidence as “more than a mere scintilla but less than a preponderance;  
10 it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”  
11 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). In determining whether the Commissioner’s  
12 findings are supported by substantial evidence, the Court reviews the administrative record as a whole,  
13 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s  
14 conclusion. *See, e.g., Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).

15 Under the substantial evidence test, the Commissioner’s findings must be upheld if supported  
16 by inferences reasonably drawn from the record. *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190,  
17 1193 (9th Cir. 2004). When the evidence will support more than one rational interpretation, the Court  
18 must defer to the Commissioner’s interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).  
19 Consequently, the issue before this Court is not whether the Commissioner could reasonably have  
20 reached a different conclusion, but whether the final decision is supported by substantial evidence.

21 It is incumbent on the ALJ to make specific findings so that the Court does not speculate as to  
22 the basis of the findings when determining if the Commissioner’s decision is supported by substantial  
23 evidence. The ALJ’s findings should be as comprehensive and analytical as feasible and, where  
24 appropriate, should include a statement of subordinate factual foundations on which the ultimate factual  
25 conclusions are based, so that a reviewing court may know the basis for the decision. *See, e.g., Gonzalez*  
26 *v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990).

1           B.       Disability Evaluation Process

2           The individual seeking disability benefits bears the initial burden of proving disability. *Roberts*  
 3 *v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must demonstrate the  
 4 “inability to engage in any substantial gainful activity by reason of any medically determinable physical  
 5 or mental impairment which can be expected . . . to last for a continuous period of not less than 12  
 6 months.” 42 U.S.C. § 423(d)(1)(A). If the individual establishes an inability to perform his prior work,  
 7 then the burden shifts to the Commissioner to show that the individual can perform other substantial  
 8 gainful work that exists in the national economy. *Reddick*, 157 F.3d at 721.

9           The ALJ follows a five-step sequential evaluation process in determining whether an individual  
 10 is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any step the ALJ determines that he can  
 11 make a finding of disability or nondisability, a determination will be made and no further evaluation is  
 12 required. *See Barnhart v. Thomas*, 540 U.S. 20, 24 (2003); *see also* 20 C.F.R. § 404.1520(a)(4). The  
 13 first step requires the ALJ to determine whether the individual is currently engaging in substantial  
 14 gainful activity (“SGA”). 20 C.F.R. § 404.1520(b). SGA is defined as work activity that is both  
 15 substantial and gainful; it involves doing significant physical or mental activities usually for pay or  
 16 profit. 20 C.F.R. § 404.1572(a)-(b). If the individual is currently engaging in SGA, then a finding of  
 17 not disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to the second  
 18 step.

19           The second step addresses whether the individual has a medically determinable impairment that  
 20 is severe or a combination of impairments that significantly limits him from performing basic work  
 21 activities. 20 C.F.R. § 404.1520(c). An impairment or combination of impairments is not severe when  
 22 medical and other evidence establish only a slight abnormality or a combination of slight abnormalities  
 23 that would have no more than a minimal effect on the individual’s ability to work. 20 C.F.R. §  
 24 404.1521; Social Security Rulings (“SSRs”) 85-28 and 96-3p.<sup>1</sup> If the individual does not have a severe

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 26           <sup>1</sup> SSRs constitute the Social Security Administration’s official interpretations of the statute it  
 27 administers and its regulations. *See Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009);  
 28 *see also* 20 C.F.R. § 402.35(b)(1). They are entitled to some deference as long as they are consistent with  
 the Social Security Act and regulations. *Bray*, 554 F.3d at 1224.

1 medically determinable impairment or combination of impairments, then a finding of not disabled is  
2 made. If the individual has a severe medically determinable impairment or combination of impairments,  
3 then the analysis proceeds to the third step.

4 The third step requires the ALJ to determine whether the individual's impairments or  
5 combination of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R.  
6 Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the individual's  
7 impairment or combination of impairments meet or equal the criteria of a listing and meet the duration  
8 requirement, 20 C.F.R. § 404.1509, then a finding of disabled is made, 20 C.F.R. § 404.1520(h). If the  
9 individual's impairment or combination of impairments does not meet or equal the criteria of a listing  
10 or meet the duration requirement, then the analysis proceeds to the next step.

11 Before considering step four of the sequential evaluation process, the ALJ must first determine  
12 the individual's residual functional capacity ("RFC"). 20 C.F.R. § 404.1520(e). The RFC is a function-  
13 by-function assessment of the individual's ability to do physical and mental work-related activities on  
14 a sustained basis despite limitations from impairments. SSR 96-8p. In making this finding, the ALJ  
15 must consider all of the symptoms, including pain, and the extent to which the symptoms can reasonably  
16 be accepted as consistent with the objective medical evidence and other evidence. 20 C.F.R. § 404.1529;  
17 SSRs 96-4p, 96-7p. To the extent that statements about the intensity, persistence, or functionally-  
18 limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the ALJ  
19 must make a finding on the credibility of the individual's statements based on a consideration of the  
20 entire case record. The ALJ must also consider opinion evidence in accordance with the requirements  
21 of 20 C.F.R. § 404.1527 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

22 The fourth step requires the ALJ to determine whether the individual has the RFC to perform his  
23 past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either as the  
24 individual actually performed it or as it is generally performed in the national economy within the last  
25 15 years or 15 years prior to the date that disability must be established. In addition, the work must have  
26 lasted long enough for the individual to learn the job and perform at SGA. 20 C.F.R. §§ 404.1560(b),  
27 404.1565. If the individual has the RFC to perform his past work, then a finding of not disabled is made.

1 If the individual is unable to perform any PRW or does not have any PRW, then the analysis proceeds  
2 to the fifth and final step.

3 The fifth and final step requires the ALJ to determine whether the individual is able to do any  
4 other work considering his residual functional capacity, age, education, and work experience. 20 C.F.R.  
5 § 404.1520(g). If he is able to do other work, then a finding of not disabled is made. Although the  
6 individual generally continues to have the burden of proving disability at this step, a limited burden of  
7 going forward with the evidence shifts to the Commissioner. The Commissioner is responsible for  
8 providing evidence that demonstrates that other work exists in significant numbers in the national  
9 economy that the individual can do. *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th  
10 Cir. 2010).

## 11 **II. BACKGROUND**

### 12 A. Procedural History

13 On December 2, 2010, Plaintiff filed an application for disability insurance benefits alleging that  
14 he became disabled on February 9, 2009. *See, e.g.*, Administrative Record (“A.R.”) 209-210. Plaintiff’s  
15 claims were denied initially on February 4, 2011, and upon reconsideration on May 19, 2011. A.R. 141-  
16 44, 148-50. On June 20, 2011, Plaintiff filed a request for a hearing before an Administrative Law Judge  
17 (“ALJ”). A.R. 151-52. On April 16, 2012, Plaintiff and Plaintiff’s attorney, and a vocational expert  
18 appeared for a hearing before ALJ Norman Bennett. *See* A.R. 103-16. On April 18, 2012, the ALJ  
19 issued an unfavorable decision finding that Plaintiff had engaged in SGA and had not been under a  
20 disability from February 9, 2009. A.R. 127-36. On May 31, 2012, Plaintiff requested review from the  
21 Appeals Council. A.R. 344.<sup>2</sup> On April 5, 2013, the Appeals Council remanded the case for a further  
22 administrative hearing. A.R. 137-39.

23 On July 18, 2013, Plaintiff, a witness, and a vocational expert appeared for a further hearing  
24 before ALJ Norman Bennett. A.R. 77-102. On July 29, 2013, the ALJ issued an unfavorable decision  
25 finding that Plaintiff had not been under a disability, as defined by the Social Security Act, from the  
26 amended alleged onset date until the date of the decision. A.R. 21-38. The ALJ’s decision became the  
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28 <sup>2</sup> Plaintiff also amended his alleged onset date to November 27, 2010. *See id.*

1 final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review on  
2 February 11, 2015. A.R. 1-7.

3 On March 19, 2015, Plaintiff commenced this action for judicial review pursuant to 42 U.S.C.  
4 § 405(g). *See* Docket No. 1. Plaintiff filed an application for leave to appear *in forma pauperis*, which  
5 the Court granted. Docket No. 2. The Court dismissed Plaintiff's complaint with leave to amend  
6 pursuant to 28 U.S.C. § 1915(e). *Id.* Plaintiff then filed an amended complaint, Docket No. 4, which  
7 the Court found sufficient for screening purposes, *see* Docket No. 5.

#### 8 B. The ALJ Decision

9 In his second decision, the ALJ followed the five-step sequential evaluation process set forth in  
10 20 C.F.R. § 404.1520, and issued an unfavorable decision on July 29, 2013. A.R. 21-38.<sup>3</sup> At step one,  
11 the ALJ found that Plaintiff met the insured status requirements of the Social Security Act through  
12 December 31, 2015, and had not engaged in substantial gainful activity since November 27, 2010. A.R.  
13 26. At step two, the ALJ found that Plaintiff had the following severe impairments: degenerative disc  
14 disease of the cervical and lumbar spine, strabismus, seizure disorder and obesity. A.R. 26-28. At step  
15 three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that meet  
16 or medically equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. A.R.  
17 27.

18 The ALJ found that Plaintiff had the residual functional capacity:

19 to lift and/or carry ten pounds occasionally, five pounds frequently, stand and/or walk for  
20 two hours in an 8-hour workday and sit for six hours in an 8-hour workday. He could  
21 never balance, but occasionally climb ramps, stairs, ladders, ropes and scaffolds, bend,  
stoop, kneel, crouch and crawl. He, also, needed to take seizure precautions, such as  
unprotected heights and being around dangers moving machinery.

22 A.R. 27-31. At step four, the ALJ found Plaintiff unable to perform his past relevant work as a dealer.  
23 A.R. 31. At step five, the ALJ found that jobs exist in significant numbers in the national economy that  
24 Plaintiff can perform based on his age, education, work experience, and residual functional capacity.  
25 A.R. 31. In doing so, the ALJ defined Plaintiff as a younger individual aged 18-44 on the alleged onset  
26 date with at least a high school education, able to communicate in English, and for whom the

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28 <sup>3</sup> As noted above, the ALJ's initial decision was remanded by the Appeals Council.

1 transferability of job skills is not material to the determination of disability. A.R. 31. The ALJ  
2 considered Medical Vocational Rules, which provide a framework for finding Plaintiff not disabled,  
3 along with vocational expert testimony that an individual with the same residual functional capacity and  
4 vocational factors could perform work such as a clerk, order clerk, and office clerk. A.R. 31.

5 Based on all of these findings, the ALJ found Plaintiff had not been disabled and denied his  
6 application for a period of disability and disability insurance benefits. *See* A.R. 31-32.

### 7 **III. ANALYSIS AND FINDINGS**

8 The primary dispute on appeal is the ALJ's consideration of the opinion of Plaintiff's treating  
9 physician, Dr. Robert Ingham. More particularly, Dr. Ingham opined that Plaintiff could only sit for  
10 three hours in a workday, but the ALJ concluded in the RFC that Plaintiff could sit for six hours in a  
11 workday. A treating physician's medical opinion as to the nature and severity of an individual's  
12 impairment is entitled to controlling weight when that opinion is well-supported and not inconsistent  
13 with other substantial evidence in the record. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th  
14 Cir. 2001). Even when not controlling, such opinions are entitled to deference and must be weighed  
15 properly pursuant to applicable regulations. *See, e.g., id.* Nonetheless, the opinion of a treating  
16 physician is not necessarily conclusive as to the existence of an impairment or the ultimate issue of a  
17 claimant's disability. *See, e.g., Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002). Even in  
18 instances in which the treating physician's opinion is not contradicted by other opinions, an ALJ is not  
19 required to accept that opinion in every case. *See, e.g., Magallanes v. Bowen*, 881 F.2d 747, 751 (9th  
20 Cir. 1989). An ALJ may reject the uncontroverted opinion of a claimant's physician only by presenting  
21 clear and convincing reasons supported by substantial evidence. *See, e.g., Lester v. Chater*, 81 F.3d 821,  
22 830 (9th Cir. 1995). Those reasons must be articulated by the ALJ in sufficient detail to enable review  
23 by higher courts. Generalized assertions that, *inter alia*, "medical opinions are not supported by  
24 sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective  
25 findings does not achieve the level of specificity [the Ninth Circuit's] cases have required." *Embrey v.*  
26 *Bowen*, 849 F.2d 418, 421 (9th Cir. 1988). Moreover, this Court is required "to review the ALJ's  
27 decision based on the reasoning and factual findings offered by the ALJ—not *post hoc* rationalizations  
28 that attempt to intuit what the adjudicator may have been thinking." *Bray*, 554 F.3d at 1225; *see also*

1 *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (“we cannot substitute our conclusions for  
2 the ALJ’s, or speculate as to the grounds for the ALJ’s conclusions” (quoting *Treichler v. Comm’r of*  
3 *Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014)).

4 Although the Commissioner disagrees with the Ninth Circuit authority establishing the “clear  
5 and convincing” standard,<sup>4</sup> her opposition brief fails to argue that a different standard should apply on  
6 the basis that the Commissioner believes Dr. Ingham’s opinion was controverted. *See* Docket No. 21  
7 at 3-4. For the first time at the hearing, however, Defendants’ counsel argued that Dr. Ingham’s opinion  
8 was controverted and, therefore, the “clear and convincing” standard should not be applied. Hearing  
9 Rec. (4/20/2016) at 11:10 - 11:11 a.m. This argument is premised on the fact that the physicians at the  
10 Mayo Clinic made a finding that Plaintiff may have difficulty with sudden or irregular changes in his  
11 support surface, but did not make findings regarding any sitting limitation. *See* A.R. 719. As an initial  
12 matter, arguments raised for the first time at a hearing are untimely and generally deemed waived. *See*,  
13 *e.g.*, *Day v. Sears Holdings Corp.*, 930 F. Supp. 2d 1146, 1168 n.84 (C.D. Cal. 2013). Moreover,  
14 Defendant has not identified any actual finding by any other physician that Plaintiff can sit for more than  
15 three hours in a workday. Defendant fails to explain why the Court should deem an opinion omitting  
16 discussion of any sitting limitation as contradicting an opinion finding such a limitation. *Cf. Widmark*  
17 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006) (“Of course, the mere absence of a corroborating  
18 opinion cannot itself constitute a conflict among the medical opinions”). As such, the Court will apply  
19 the “clear and convincing” standard in this case.

20 Dr. Ingham found that Plaintiff was limited to sitting for three hours each workday. A.R. 601.  
21 The ALJ determined that Plaintiff’s RFC allowed him to sit for up to six hours each day. A.R. 28. The  
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24 <sup>4</sup> The Commissioner argues that the Ninth Circuit’s case law establishing this standard is erroneous.  
25 Docket No. 21 at 3-4 (“To the extent the Ninth Circuit’s judicially-created standard exceeds the requirements  
26 set forth by Congress and by the Commissioner at the behest of Congress, it would appear to be improper”).  
27 Of course, a judge at the district court level “may not respectfully (or disrespectfully) disagree with [her]  
28 learned colleagues on [her] own court of appeals who have ruled on a controlling legal issue . . . Binding  
authority must be followed unless and until overruled by a body competent to do so.” *Hart v. Massanari*,  
266 F.3d 1155, 1170 (9th Cir. 2001).

ALJ does not explicitly explain how he made that determination. In total, the ALJ's discussion of Dr. Ingham's opinion is as follows:

Dr. Robert Ingham found that the claimant could lift and/or carry ten pounds occasionally, five pounds frequently, stand and/or walk for three hours in an 8-hour workday and sit for three hours in an 8-hour workday. He could never climb, balance or stoop, but occasionally kneel, crouch and crawl and frequently reach above shoulder level. He needed to avoid unprotected heights, being around moving machinery and exposure to dusts, fumes and gases. He, also, needed to avoid moderate exposure to extreme temperature and humidity and driving automotive equipment. Dr. Ingham, also, found that the mental effects of the claimant's pain would eliminate skilled work tasks. (Exhibit 15F). Dr. Ingham, also, found that the claimant was unable to drive a car or work at heights with machinery exposed parts due to non-epileptic seizure events, migraine headaches and other loss of consciousness. (Exhibit 20F). I gave little weight to the remainder of Dr. Ingham's opinion because the record as a whole did not support the limitation found by Dr. Ingham.

A.R. 30. As an initial matter, it is not entirely clear from this statement whether the ALJ was intending to give significant or limited weight to Dr. Ingham's finding that Plaintiff can only sit for three hours each workday. The ALJ listed numerous limitations found by Dr. Ingham, only some of which were incorporated in the RFC, and then merely stated that he was giving limited weight to the "remainder" of Dr. Ingham's opinion.

Because the RFC does not incorporate Dr. Ingham's finding of a three-hour sitting limitation, it appears that was a limitation found by Dr. Ingham for which the ALJ afforded little weight based on the lack of support in the "record as a whole." Such reasoning is not sufficient. As noted above, the reasons for rejecting an uncontroverted treating physician's opinion must be "clear and convincing." Moreover, the Ninth Circuit has eschewed reliance on generalized statements that a physician's opinion is not sufficiently supported by the record. *See, e.g., Embrey*, 849 F.2d at 421.

Defendant nonetheless attempts on appeal to divine the ALJ's reasons for rejecting the sitting limitation found by Dr. Ingham, pointing to statements made by the ALJ in other portions of his decision and hypothesizing additional reasons that are absent from the ALJ's decision. For example, Defendant argues that the ALJ rejected this aspect of Dr. Ingham's opinion as inconsistent with the findings of the Mayo Clinic (discussed earlier in the ALJ's decision) and inconsistent with Plaintiff's ability to work while his symptoms were at the same level of severity (discussed later in the decision in finding the Plaintiff's statements not credible). Docket No. 21 at 5-6. Defendant also argues that certain portions of Dr. Ingham's opinion may be rejected as conclusory, Docket No. 21 at 6, and that Dr. Ingham's

1 opinion on the sitting limitation is undermined by the fact that portions of the record suggest Plaintiff  
2 preferred to sit more than stand, while Dr. Ingham implicitly found that Plaintiff could stand and sit for  
3 equal amounts of time, Hearing Rec. (4/20/2016) at 11:14 - 11:15 a.m. With respect to the latter,  
4 however, Defendant's counsel conceded that no such reasoning was articulated by the ALJ in his  
5 opinion. Hearing Rec. (4/20/2016) at 11:17 a.m. (acknowledging that the ALJ never stated that Dr.  
6 Ingham's opinion should be discounted based on Plaintiff's preference for sitting rather than standing,  
7 but opining such an inconsistency would be a "fair reading of the record"). The Court declines  
8 Defendant's invitation to engage in this exercise of guessing possible reasons the ALJ did or could reject  
9 Dr. Ingham's opinion. The Court reviews those reasons actually articulated by the ALJ, "not *post hoc*  
10 rationalizations that attempt to intuit what the [ALJ] may have been thinking." *Bray*, 554 F.3d at 1225.  
11 The only reason provided is that Dr. Ingham's opinion was not supported by the record as a whole,  
12 which is plainly insufficient. Accordingly, the Court finds that the ALJ failed to articulate clear and  
13 convincing reasons for rejecting Dr. Ingham's opinion that Plaintiff was limited to sitting for three hours  
14 in each workday.<sup>5</sup>

15 Having determined that the ALJ erred, the Court turns to the appropriate remedy. Plaintiff argues  
16 that the Court should remand the case for an award of benefits, while Defendant argues that the Court  
17 should remand the case for further proceedings and findings by the ALJ. The proper relief upon finding  
18 that an ALJ has erred is an issue entrusted to the discretion of the Court. *See Harman v. Apfel*, 211 F.3d  
19 1172, 1177 (9th Cir. 2000). Remand is appropriate when additional proceedings may cure the defects  
20 in the ALJ's decision, and where the Commissioner is in a better position to evaluate the evidence. *See*,  
21 *e.g.*, *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). In this case, the Court finds remand  
22 appropriate for the ALJ to either accept Dr. Ingham's opinion regarding Plaintiff's sitting limitation or  
23 to articulate sufficient reasons for rejecting that opinion. *See Embrey*, 849 F.2d at 422 & n.3.

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27 <sup>5</sup> Plaintiff argues on appeal that the ALJ's determination is not supported by substantial evidence.  
28 *See, e.g.*, Docket No. 16 at 17. Because the Court finds that the ALJ erred on other grounds, the Court does  
not reach that issue.

1           **IV. CONCLUSION**

2           Based on the forgoing, the undersigned hereby **RECOMMENDS** that Plaintiff's Motion for  
3 Reversal and/or Remand (Docket No. 16) be **GRANTED** in part, that Defendant's Cross-Motion to  
4 Affirm (Docket No. 21) be **DENIED**, and that this case be **REMANDED** for further proceedings.

5           DATED: May 5, 2016

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9           NANCY J. KOPPE  
10           United States Magistrate Judge

11                           **NOTICE**

12           Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be**  
13 **in writing and filed with the Clerk of the Court within 14 days of service of this document.** The  
14 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to  
15 the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This  
16 circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly  
17 address and brief the objectionable issues waives the right to appeal the District Court's order and/or  
18 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th  
19 Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).  
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